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STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

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Re: *William J. LaPoint, et al. v. AmerisourceBergen Corp.*
Civil Action No. 327-N

Dear Counsel:

Before me are two separate discovery disputes. The first dispute asks whether a plaintiff may have *ex parte* communications with a former manager of a defendant corporation who, during her employment, was exposed to extensive privileged information while working with counsel in formulating the corporation's defense. This disputed issue is apparently novel in Delaware and, therefore, merits greater explication than a typical discovery dispute. The second dispute will be dealt with only briefly.

I. FACTUAL BACKGROUND

This discovery dispute arises in a breach of contract case. Defendant AmerisourceBergen Corporation ("ABC") purchased Bridge Medical Corporation, Inc. ("Bridge") in 2002 for $27 million and the possibility of earnout payments

capped at an additional $55 million. The earnouts were contingent upon Bridge achieving certain EBITA targets in 2003 and 2004. Plaintiffs, former shareholders of Bridge, allege that ABC violated the 2002 merger agreement by improperly calculating Bridge's EBITA.

Plaintiffs first sought to conduct *ex parte* interviews of several ABC employees in June 2004. Such employees were also former shareholders of Bridge and, therefore, had personal interests adverse to those of ABC. Following briefing and oral argument, this Court issued an Order on July 9, 2004 (the "July 9 Order"), prohibiting plaintiffs from having *ex parte* contact with "management level employees of ABC or any ABC subsidiary."

A dispute ensued over who were "management level" employees. At oral argument, on October 5, 2004, this Court sided with ABC, and ruled that all five disputed Bridge employees were indeed "management level" employees within the scope of the July 9 Order. Before the Court could memorialize its Order, however, ABC terminated one of the five employees—Russell ("Rusty") Lewis. Accordingly, in the written Order of October 22, 2004 (the "October 22 Order"), this Court noted that:

> Russell Lewis was management of defendant up to and including October 9, 2004. However, Russell Lewis is no longer employed by defendant and is therefore no longer governed by the Court's July 9, 2004 Order.

Following the October 22 Order, counsel for ABC twice met with one of the remaining four management level employees—Brenda Kraft. As the Vice President of Finance, Kraft played a role in the preparation of the challenged earnout calculation. In meetings and other communications with her, counsel for ABC disclosed their mental impressions, conclusions, opinions and developing legal theories, and discussed the strengths and weaknesses of plaintiffs' claims.

On June 16, 2005, ABC announced the sale of Bridge to Cerner Corporation. All Bridge employees were terminated in the months after the sale was consummated, including the four prior senior management-level designees. On March 30, 2006, plaintiffs sent Kraft a *Monsanto* letter.[1] Kraft responded, and at the outset of that conversation, plaintiffs' counsel confirmed that Kraft was not

[1] The parties had agreed to use a particular form letter when contacting non-management employees. *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 593 A.2d 1013, 1019-20 (Del. Super. 1990).

presently represented by counsel. Kraft then raised the possibility of plaintiffs' counsel representing her.

As a matter of courtesy (or presciently anticipating the objections before me), plaintiffs' counsel wrote to ABC's counsel to inform them of Kraft's request. In that letter and since, plaintiffs' counsel promised not to ask Kraft about the substance of any privileged communications, to instruct Kraft not to reveal such information, and to take all other reasonable steps to protect the confidentiality of such information.

ABC objects to any *ex parte* contact with Kraft. ABC argues that Kraft is still a court-ordered management designee under the October 22 Order, and that any *ex parte* contact with Kraft threatens the disclosure of privileged communications, including litigation strategy.

Plaintiffs argue that because Kraft is no longer an employee of ABC, she is not subject to the October 22 Order, nor the order's underlying rationale.

II. ANALYSIS

Rule 4.2 of the Delaware Lawyer's Rules of Professional Conduct prohibits communication with a party represented by an attorney unless counsel consents.[2] The comments to Rule 4.2 explain the operation of the rule in the context of an organization such as ABC and Bridge. Rule 4.2 prohibits:

> communications with a constituent of an organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.[3]

Rule 4.2 is intended to apply to those employees with authority to bind or to speak for the corporation.[4] "Consent of the organization's lawyer is not required for communication with a former constituent." However, "[i]n communicating with a

[2] *Del. Prof. Cond. R.* 4.2.
[3] *Del. Prof. Cond. R.* 4.2 cmt.
[4] *DiOssi v. Edison*, 583 A.2d 1343, 1346-47 (Del. Super. 1990) (noting that the Rule serves to protect the attorney client relationship, not to protect a party from the discovery of non-privileged evidence).

current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization."[5]

In the October 22 Order, this Court tacitly acknowledged that Rule 4.2 does not bar *ex parte* communications with former management employees of an adverse party who were not privy to extensive privileged communications. Such an interpretation of Rule 4.2 is in accord with holdings of other jurisdictions.[6]

Courts are occasionally faced with the more difficult question of whether to permit *ex parte* communications with former management employees who were privy to extensive privileged communications. The majority of courts have permitted such communications, provided that privileged information remained protected.[7] These courts have generally looked for guidance to the American Bar Association Committee on Ethics and Professional Responsibility (the "ABA"), which has similarly declined to extend the ambit of Rule 4.2 to cover such former employees, in particular because doing so would "inhibit the acquisition of

[5] *Del. Prof. Cond. R.* 4.2 cmt.

[6] *See, e.g., Ramada Franchise Sys., Inc. v. Tresprop, Ltd.*, 75 F. Supp. 2d 1205, 1209 (D. Kan. 1999) (Rule 4.2 "does not prohibit counsel from contacting unrepresented former managerial employees of an opposing party"); *Aiken v. Bus. and Indus. Health Group, Inc.*, 885 F. Supp. 1474, 1476-79 (D. Kan. 1995) (Rule 4.2 does not prohibit contact with doctors formerly employed by occupational medical clinic); *Tipton v. Sonitrol Sec. Sys., Inc.*, 958 F. Supp. 447 (E.D. Mo. 1996) (concluding that Rule 4.2 does not prohibit *ex parte* communications with former management level employees); *Humco v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000) (ruling that a lawyer may interview a former management employee).

[7] *FleetBoston Robertson Stephens v. Innovex, Inc.*, 172 F. Supp. 2d 1190, 1193-5 (D. Minn. 2001) (permitting party to interview former CEO of adverse party where no privileged information is sought); *Olson v. Snap Prods., Inc.*, 183 F.R.D. 539, 544 (D. Minn. 1998) (permitting *ex parte* contacts with former employees who had been privy to privileged communications provided that sufficient steps were taken to ensure that the privilege was protected); *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004) (permitting *ex parte* contact with former office administrator who was involved in preparing the defendant corporation's defense to the lawsuit).

information about one's case."[8] The ABA's interpretation of Rule 4.2 is "persuasive guidance" in Delaware.[9]

Defendant cites a number of cases purportedly prohibiting *ex parte* communications with certain former employees. While making use of much broader language, two of the cases seemingly stand for the much narrower proposition that attorneys may not inquire into areas protected by attorney-client privilege, and will be severely punished when they do so.[10] The second two cases have arguably been eclipsed. *Porter v. Arco Metals Co.*[11] no longer accurately reflects the law of Montana because it was based on the "pre-2002 version of Rule 4.2."[12] It likewise appears that changes to New Jersey state law have superseded the final case cited by defendant.[13]

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[8] ABA Committee on Prof'l Ethics & Prof'l Responsibility, Formal Op. 91-359, at 3 (1991). A more complete excerpt states:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers, [sic] the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.
>
> Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer."

[9] *See DiOssi*, 583 A.2d at 1344 (Delaware courts "look to the ABA's interpretation of Model Rule 4.2, which is identical to the Delaware Rule, for persuasive guidance.").

[10] *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996) (striking former litigation specialist's testimony against former client, when subject of testimony included communications between himself and the client's attorneys, as well as confidential communications prepared by or based on advice of counsel, including counsel's appraisal of the strength of plaintiff's case); *MMR/Wallace Power and Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712 (D. Conn. 1991) (disqualifying attorney for *ex parte* contact with former employee and member of adverse party's litigation team, when former employee disclosed privileged information).

[11] 642 F. Supp. 1116 (D. Mont. 1986).

[12] *U.S. v. W.R. Grace*, 401 F. Supp. 2d 1065 (D. Mont. 2005).

[13] *See Public Serv. Elec. and Gas Co. v. Associated Elec. and Gas Inc. Servs.,*745 F. Supp. 1037 (D. N.J. 1990); *Klier v. Sordoni Skanska Const. Co.*, 766 A.2d 761, 769 (N.J. Super. Ct. App. Div. 2001) (holding that changes in New Jersey state law mean that a party may interview a

I find the reasoning of the majority of states and the ABA persuasive and, therefore, adopt a similar rule. One party's attorney may contact a former manager of an adverse party *ex parte*, even if the former employee was privy to extensive privileged communications, as long as the attorney is seeking only key non-privileged facts, and makes the former employee aware that she cannot divulge any communications she may have had with the adverse party's attorneys, or any other privileged information. Because plaintiffs' attorneys are seeking non-privileged information from Kraft, a key fact witness, and because they will make her aware of the severe consequences of disclosing privileged communications of her former employer, I deny ABC's motion to preclude *ex parte* contacts.

III. PLAINTIFFS' MOTION FOR COMMISSION

Defendant opposes plaintiffs' motion for a commission directed to Cerner. Plaintiffs seek documents reflecting the financial results for Bridge in 2005 and 2006, after it had been acquired by Cerner. Defendant argues that such documentation is irrelevant to calculating Bridge's EBITA during 2003 and 2004, the relevant period for the earnout. Plaintiffs respond that Bridge was mismanaged by ABC, and that Bridge's performance as a part of Cerner will demonstrate the extent of the mismanagement, or what revenue Bridge could have generated during the earnout period but for ABC's alleged wrongdoing. Despite ABC's protestations, they have not met their burden of showing that the discovery requests are irrelevant or unduly burdensome. Plaintiffs' motion for commission is granted, and defendant's cross-motion for a protective order is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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WBCIII:bsr

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former member of an adverse party's control group if that former employee has disavowed the corporation's representation).